

March 2016

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Recommended Citation

Arjun Rangarajan, *Civil Gideon, Removal Proceedings and Parental Right Termination: A Curious Intersection*, 8 DePaul J. for Soc. Just. 387 (2015)

Available at: <https://via.library.depaul.edu/jsj/vol8/iss2/11>

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CIVIL GIDEON, REMOVAL PROCEEDINGS, AND PARENTAL RIGHT TERMINATION: A CURIOUS INTERSECTION

ARJUN RANGARAJAN*

INTRODUCTION

The question of whether a party has a Constitutional right to competent representation of counsel in civil lawsuits has usually been answered in the negative by courts. There is good reason for that – typically parties are fighting over money and no one's physical liberty is at stake. It would be in society's best interest to conserve the state's resources in such lawsuits and let the parties provide their own counsel.

However, there are some situations where there is more at stake than just money. Two examples are the risk of deportation in an immigration proceeding, and the risk of losing custody in juvenile dependency proceedings. Although in theory both are civil lawsuits where the physical liberty of a person is not under threat, it is not unreasonable to think of these two proceedings as, in some senses, infringing upon a fundamental right. They are also two practice areas where it is very common to see ineffective assistance of counsel, and they affect sections of society that are typically poor and cannot afford lawyers. Studies have shown that immigrants who are compelled to represent themselves are five times more likely to lose their cases.¹

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¹ NEW YORK IMMIGRANT REPRESENTATION STUDY REPORT, ACCESSING JUSTICE II: A MODEL FOR PROVIDING COUNSEL TO NEW YORK IMMIGRANTS IN REMOVAL PROCEEDINGS 11 (2012).

An interesting area of overlap is a scenario where a parent is facing deportation from the United States, away from his or her child who will remain in the United States. In effect, that is a termination of parental rights.

So how have courts ruled on these two issues and how have legislatures treated the two areas? Surprisingly differently; partly because one is governed by state law and the other is a federal issue. In immigration proceedings, the closest we have come to affording right to counsel was in a recent case in which the Central District of California recognized the right to representation for mentally incompetent immigration detainees facing deportation.²

On the other hand, California allows, by statute, the right to counsel in proceedings where termination of parental rights may result. In addition to these statutory rights, an indigent parent may in some cases have a right to counsel under due process implications.³ Immigration proceedings that result in termination of parental rights are in a curious no man's land that cannot be reached by state law.

In this paper, I aim to introduce the concept of right to counsel, and briefly examine the history of the right to counsel in civil proceedings. I will then compare two cases, *Gonzalez* and *Kristin H*, and examine if there is any policy reason to treat the subjects of these two cases differently. I will then explore the intersection of the two areas in a case in which deportation involves the termination of parental rights. In that context, I examine a marginally related Ninth Circuit case where removal would potentially result in termination of parental rights.

Finally, I will make some recommendations and observations regarding how this unfortunate situation, the absence of the

² *Franco-Gonzalez v. Holder*, 2013 U.S. Dist. LEXIS 186258 (C.D. Cal. 2013).

³ *In re Kristin H.*, 46 Cal. App. 4th 1635, 1659 (Cal. App. 1996).

right to counsel in removal proceedings effectively resulting in termination of parental rights, may perhaps be remedied.

I. CIVIL GIDEON

Judge Sweet, of the Southern District of New York, made one of the earliest arguments for the right to counsel in civil cases in his 1997 Arps lecture.⁴ “In short, we need a civil *Gideon*,” he said, “that is, an expanded constitutional right to counsel in civil matters.” Previously, in *Gideon*, the United States Supreme Court held that the Sixth Amendment right to counsel in all criminal cases was a fundamental right applicable to the states via the Fourteenth Amendment.⁶ The Court’s reasoning was that the right to counsel represented a “fundamental right” much like the First Amendment right to freedom of speech, or the Fifth Amendment right to fair compensation during a government ‘taking’ of property because criminal trials potentially resulted in the loss of liberty.⁷

A. *Right to Counsel in Dependency Proceedings*

1. Under U.S. Constitution

The Supreme Court was asked to consider the availability of appointed counsel in a case that involved termination of parental rights, *Lassiter v. Dep’t of Soc. Services*.⁸ In *Lassiter*, the court observed that there was a presumption against the right to appointed counsel in cases that do not result in loss of physical liberty, and thus held that there was no right to counsel in such

⁴ The Hon. Robert W. Sweet, *Civil Gideon and Confidence in a Just Society*, 17 YALE L. & POL’Y REV. 503 (1998). He went on to speak specifically about cases that would potentially result in termination of parental rights.

⁵ *Gideon v. Wainwright*, 372 U.S. 335 (1963).

⁶ U.S. CONST. AMEND. VI; U.S. CONST. AMEND. XIV.

⁷ *Gideon*, 372 U.S. at 341.

⁸ *Lassiter v. Dep’t of Soc. Services*, 452 U.S. 18 (1981).

cases under the U.S. Constitution's Due Process Clause.⁹ Therefore, the trial court could only address the issue of counsel appointment on a case-by-case basis.¹⁰

Justice Blackmun, writing for the dissenters, pointed out that before *Gideon* the right to counsel in state criminal cases required an 'unworkable' case-by-case analysis.¹¹ He argued that procedural norms were meant to "protect litigants against unpredictable and unchecked governmental action," precisely the kind involved in parental rights cases.¹² Hence, he suggested that the Constitutional Due Process guarantee would require appointment of counsel.¹³

California courts have held that when a parent has established that he or she has a due process right to counsel in a specific case per *Lassiter*, he or she is entitled to effective counsel¹⁴. Otherwise, such a right would simply be a "hollow right."¹⁵

2. Under State Statutes (California)

Nevertheless, subsequent to (and to some extent before) *Lassiter* many states have statutorily allowed for appointed counsel in parental termination cases.¹⁶ Not surprisingly, California's statute provides not just for the right to counsel, but

⁹ U.S. CONST. AMEND. XIV. It has long been recognized that the Sixth Amendment applies only to criminal cases.

¹⁰ "Whether due process requires appointment of counsel in any given case would depend upon the weighing of private and governmental interests, and the risk of an erroneous decision." *Kristin*, 46 Cal. App. 4th at 1659 (citing to *Lassiter*, 452 U.S. at 28.).

¹¹ *Id.* at 35-36.

¹² *Id.*

¹³ *Id.*

¹⁴ *In re Christina P.* 175 Cal. App. 3d 115, 129 (Cal. App. 1985).

¹⁵ *Id.*

¹⁶ Susan Calkins, *Ineffective Assistance of Counsel in Parental -Rights Termination Cases: The Challenge for Appellate Courts*, 6 J. APP. PRAC. & PROCESS 179, 193 (2004) ("According to *Lassiter*, thirty-three states and the District of Columbia provided counsel to parents in termination cases by 1981.").

also for the right to *competent* counsel. California Welfare and Institutions Code states: “All parties who are represented by counsel at dependency proceedings shall be entitled to competent counsel.”¹⁷ The family code further states: “If a parent appears without counsel and is unable to afford counsel, the court shall appoint counsel for the parent, unless that representation is knowingly and intelligently waived.”¹⁸

3. California Case law Interpreting Statutes

Expounding on the statutory right to counsel in dependency proceedings, the California Court of Appeals in *In re Kristin H.* held that the legislature’s provision for competent counsel necessarily implied a right to judicial review of claims of incompetence of counsel.¹⁹ In other words, the mother’s claim of ineffective assistance was cognizable in the Court of Appeal as a petition for writ of habeas corpus.²⁰ The reasoning behind the court’s conclusion provides some valuable insight regarding its impression of the right to counsel in civil proceedings in general.

Kristin H. was a four-year old girl who had been living with her mother for most of her childhood.²¹ Her mother was upset over a friend’s recent death, and after snorting a line of some substance (that she thought was “either coke or meth”), felt sick and was paralyzed.²² Kristin’s mother then alerted her psychiatrist, her neighbor, her sister, and her boyfriend, Emilio Diaz.²³ Diaz called 911. When the police arrived, they found a mirror and a plastic straw containing a residue of a white powder in a location that could be reached by Kristin.²⁴ Kristin was taken

¹⁷ CAL. WEL. & INST. CODE § 317.5(A) (2014).

¹⁸ CAL. FAM. CODE § 7862. (2014).

¹⁹ *Kristin H.*, 46 Cal. App. 4th at 1642; see *supra* note 11, *supra*.

²⁰ *Id.*

²¹ *Id.* at 1643.

²² *Id.*

²³ *Id.*

²⁴ *Id.*

into protective custody.²⁵ There had been two prior incidents where the mother had failed to adequately supervise Kristin according to the Department of Family and Children's Services services.²⁶

During her visits with Kristin, the mother was visibly upset that the authorities had kept Kristin away from her. The mother and Kristin seemed to share a deep bond, and the mother complained about the incompetence of the social worker and about the rules at the facility.²⁷ Subsequently, the social worker recommended that Kristin be reunited with her mother because the "visits were going well".²⁸ However, soon after receiving this positive report from the social worker, the mother once again lost her temper during a visit to see her daughter.²⁹ Police had to be called in to defuse the situation.

The trial court then suspended the mother's visitation pending a psychiatric evaluation. Based partly on the medical report, the court wrote: "Despite the extraordinary efforts of the social worker, the mother's continuing inability to follow medical advice makes it detrimental to return Kristin to her mother's care at this time."³⁰ It concluded that Kristin would not be returned to her mother. Kristin filed her own notice of appeal, where, among other things, she stated that she had not received adequate representation by counsel.³¹

The Court of Appeals concluded that the record fully supported the finding that there was a substantial risk Kristin would suffer serious physical harm while with her mother and moved on to the issue of the writ of habeas corpus.³² The mother's argument was that her counsel had failed to present favorable evi-

²⁵ *Id.*

²⁶ *See id.* at 1644.

²⁷ *See id.*

²⁸ *Id.* at 1645.

²⁹ *Id.* at 1646.

³⁰ *Id.* at 1648-49.

³¹ *Id.*

³² *Id.* at 1657, 1658.

dence regarding her mental state in the form of an expert psychiatric evaluation performed by Dr. Charles DeLong.³³

In evaluating the merits, the Court of Appeal stated:

Courts which have taken the contrary view [sic] reason that dependency proceedings are civil in nature and that their primary purpose is not to prosecute the parent but to protect the child. [citations.] Several assumptions underlie this reasoning: civil proceedings involve property rights, not personal liberties; appeal on grounds of ineffective assistance of counsel should be reserved for those cases involving fundamental interests; allowing claims of ineffective assistance of counsel will cause delay and consequently does not serve the best interests of the child.³⁴

The Court of Appeal also noted the overlap between a Section 300 dependency proceeding and a termination proceeding, especially given that both processes were governed by one comprehensive statutory scheme.³⁵ Although the court agreed that the child's interest must be given significant weight in dependency and termination proceedings, it did not agree that this necessarily meant that a parent did not have the right to assert ineffective assistance of counsel.

The court's rationale behind finding a right to civil assistance of counsel in such proceedings is worth noting:

³³ *Id.*

³⁴ *Id.* at 1660.

³⁵ *Id.* at 1661 ("Practically speaking, once the state has become involved in the parent/child relationship through a section 300 dependency proceeding, there is a substantial possibility that the parent may lose custody of the child or be separated from the child for significant periods of time. Like termination proceedings, dependency proceedings may work a unique kind of deprivation. Indeed, they are frequently the first step on the road to permanent severance of parental ties.")

Although parents in dependency proceedings are not prosecuted as defendants, petitions often contain allegations of criminal activity. The proceedings are adversarial in nature [citation]. The governmental agency is represented by its own counsel and employs professional social workers who are empowered to investigate the family situation and to testify against the parent. Moreover, the possible end result of the process, namely the total and irrevocable severance of the parent-child relationship, has been acknowledged as a punitive sanction. (See, e.g., H.R.Rep. No. 95-1386, p. 22 (1978) accompanying the Indian Child Welfare Act of 1978, Pub.L. No. 95-608, 92 Stat. 3069 [removal of a child from the parents is a penalty as great, if not greater, than a criminal penalty]. California statutes and rules of court recognize the gravity of the possible deprivation involved in dependency proceedings and the importance of protecting the fundamental rights of parents and ensuring a fair and accurate adjudication.

Finally, the Court of Appeal concluded that the mother's statutory right to competent counsel entitled her to raise a claim through a petition for writ of habeas corpus, and hence remanded the case to the trial court with an order to show cause.³⁶

As I will note during the rest of this paper, much of the rationale from the quoted paragraphs above applies equally to removal proceedings in immigration cases.

B. Right to Counsel in Immigration Proceedings

Removal proceedings, previously referred to as "deportation proceedings", are those in which the United States government

³⁶ *Id.* at 1667, 1672.

seeks to forcibly remove an inadmissible non-United States citizen from the country.³⁷ It is commonly acknowledged that removal proceedings involve situations where much is at stake for the detainee, and hence the need for effective assistance of counsel is high.³⁸ Sadly, the percentage of detainees facing removal that are represented by counsel, is often very low, roughly 50% for the 2007-2011 period.³⁹

Justice Douglas, writing for the U.S. Supreme Court, rightly pointed out that “[t]hough deportation is not technically a criminal proceeding, it visits a great hardship on the individual and deprives him of the right to stay and live and work in this land of freedom. That deportation is a penalty — at times a most serious one — cannot be doubted. Meticulous care must be exercised lest the procedure by which he is deprived of that liberty not meet the essential standards of fairness.”⁴⁰

There are numerous similarities between removal and dependency proceedings: both involve more than money damages; both involve the taking away of what can be considered “fundamental rights”; and both are adversarial in nature. However, a key difference is that child custody is an area of state law, whereas immigration is an area governed exclusively by the federal government. While courts recognize a critical competing interest of a child in dependency cases, federal courts in immigration cases do not weigh this critical competing interest.

³⁷ See Kevin R. Johnson, *An Immigration Gideon for Lawful Permanent Residents*, 122 YALE L.J. 2394, 2399 (2013); See also 8 U.S.C. § 1229A (2006) (providing for removal proceedings). Deportation proceedings are now called removal proceedings after the Illegal Immigration Reform and Immigrant Responsibility Act (IIRIRA) of 1996. See *Jimenez-Angeles v. Ashcroft*, 291 F.3d 594, 597 (9th Cir. 2002) (“[The U.S. government] did not commence [deportation] proceedings[,] now called “removal” proceedings under IIRIRA.”)

³⁸ See e.g., Johnson, *supra* note 37, at 2399; Robert A. Katzmann, *The Legal Profession and the Unmet Needs of the Immigrant Poor*, 21 GEO. J. LEGAL ETHICS 3, 5-8 (2008).

³⁹ Johnson, *supra* note 37, at 2399.

⁴⁰ *Bridges v. Wixon*, 326 U.S. 135, 154 (1945).

The next few sections examine how the right to counsel has been treated in immigration cases. Immigration proceedings are classified as and proceed in the form of civil proceedings.⁴¹ Accordingly, the court has discretion over the appointment of counsel in these cases – with trial courts denying counsel almost 50% of the time.⁴²

1. Under the United States Constitution

Unlike in criminal cases, the Sixth Amendment does not guarantee representation by counsel in civil cases, including immigration cases.⁴³ Hence, any right to counsel in removal proceedings would have to be based on a Fifth Amendment Due Process right.⁴⁴

In *Larra-Torres v. Gonzalez*, the Ninth Circuit summarized in two parts the test for a detainee to show a violation of his or her Fifth Amendment Due Process rights through ineffective assistance of counsel: “(1) the alleged ineffective assistance rendered the proceeding so fundamentally unfair that they were prevented from reasonably presenting their case, and (2) substan-

⁴¹ *I.N.S. v. Lopez-Mendoza*, 468 U.S. 1032, 1038 (1984) (“A deportation proceeding is a purely civil action to determine eligibility to remain in this country, not to punish an unlawful entry, though entering or remaining unlawfully in this country is itself a crime. . . . The judge’s sole power is to order deportation; the judge cannot adjudicate guilt or punish the respondent for any crime related to unlawful entry into or presence in this country.”)

⁴² See EXECUTIVE OFFICE OF IMMIGRATION REVIEW, FY2011 STATISTICAL YEARBOOK, at G1. (2012).

⁴³ U.S. CONST. AMEND. VI; *Magallanes-Damian v. INS*, 783 F.2d 931, 933 (9th Cir. 1986) (noting that, since deportation and removal proceedings are civil, they are “not subject to the full panoply of procedural safeguards accompanying criminal trials.”)

⁴⁴ See *Iturribarria v. INS*, 321 F.3d 889, 899 (9th Cir. 2003) (“In deportation proceedings, an alien’s right to be represented by counsel is based on the due process guarantees of the Fifth Amendment. [citations]. . . . Accordingly, ineffective assistance of counsel in a deportation hearing results in a denial of due process under the Fifth Amendment only when the proceeding is so fundamentally unfair that the alien is prevented from reasonably presenting her case [citation.]”)

tial prejudice, which is essentially a demonstration that the alleged violation affected the outcome of the proceedings.”⁴⁵

In other words, there is no right to counsel in immigration proceedings, and the burden on the detainee to show ineffective assistance is extremely high.

One example where the U.S. Supreme Court did find ineffective assistance of counsel was in *Padilla v. Kentucky*, where a non-citizen was not advised of his potential removal consequences when he pled guilty in a criminal case.⁴⁶ Padilla, a lawful immigrant from the Honduras, had been a United States permanent resident for forty years.⁴⁷ Upon his counsel’s advice that he would “not have to worry” about immigration consequences of a guilty plea, Padilla pled guilty to marijuana transport.⁴⁸ However, his attorney’s advice turned out to be incorrect.⁴⁹ *Padilla v. Kentucky* is sometimes acknowledged as a first step towards a constitutional right to counsel in removal proceedings.⁵⁰

2. Statutory Protection

The statutory right to counsel in removal proceedings is empty. In theory, any person facing removal is entitled by statute to be represented by counsel; however, the catch is that this representation must be “at no expense to the Government.”⁵¹

⁴⁵ *Lara-Torres v. Gonzales*, 2004 U.S. App. LEXIS 28368, 8-9 (9th Cir. 2005) (internal citations, quotation marks, and formatting omitted).

⁴⁶ *Padilla v. Kentucky*, 559 U.S. 356 (2010).

⁴⁷ <Could you please fix citation> I have only S. Ct citation 130 S.Ct 1473, 1477 (2010) .

⁴⁸ *Id.* at 1478.

⁴⁹ *Id.*

⁵⁰ See, e.g., Daniel Kanstroom, *The Right to Deportation Counsel in Padilla v. Kentucky: The Challenging Construction of the Fifth-and-a-Half Amendment*, 58 U.C.L.A. L. REV. 1461, 1468 (2011) (“It means, simply put, that noncitizen criminal defendants now have a right to competent deportation counsel in criminal court.”)

⁵¹ 8 U.S.C. § 1362 (2012).

3. Recent Case Law Regarding Right to Counsel in Removal Proceedings

Four years after *Padilla*, there was a significant step towards implementing right to counsel for immigrants. In a case involving persons with serious mental disorders facing removal, the Central District of California ruled that such a ‘class’ of people had the right to be represented by competent counsel.⁵²

In a case where the detainees were represented by some very able advocates at the American Civil Liberties Union (ACLU), Judge Gee, writing for the district court, issued preliminary injunctions requiring the federal government to insure legal representation for a specific class of plaintiffs.⁵³ This class of plaintiffs consisted of immigrants with mental disabilities who had been held for years by the Immigration and Customs Enforcement (ICE) without any active proceedings.⁵⁴ The government detained and placed into removal proceedings members of this class, who were clearly not competent to represent themselves, and the government “imposed on itself no legal obligation to provide representation for such individuals in their immigration proceedings.”⁵⁵ The government argued that “legal representation for all mentally incompetent aliens detained for removal proceedings . . . amount[ed] to a ‘fundamental alteration’ of the immigration court system, primarily because the Executive Office of Immigration Review [did] not have the capacity or funding to implement such a program.”⁵⁶ The ACLU argued, on behalf of the class, that the federal Rehabilitation Act required legal representation as a “reasonable accommodation” under

⁵² *Franco-Gonzales v. Holder*, 2013 U.S. Dist. LEXIS 186258 (2013). See *supra* note 2. See also Lucas Guttentag, & Ahilan Arulanantham, *Extending the Promise of Gideon: Immigration, Deportation, and the Right to Counsel*, ABA Human Rights Magazine, Vol. 39 No. 4 (2012).

⁵³ *Franco-Gonzales*, 2013 U.S. Dist. LEXIS 186258 *Supra* note 2, at *14.

⁵⁴ *Id.* at *8.

⁵⁵ *Id.*

⁵⁶ *Id.* at *21.

section 504.⁵⁷ The court sided with the detainees, finding that they only sought to participate meaningfully in the immigration court process. On the question of funding such a program, the court noted:

The Court is wary of issuing an unfunded mandate requiring Government-paid counsel for all mentally incompetent class members. Indeed, neither this Order nor the Court's previous preliminary injunction rulings requires [the government] to provide [detainees] with paid legal counsel. [The government has] in the past been able to obtain pro bono counsel for certain class members from various non-profit organizations and pro bono panels.⁵⁸

Although only a small step, and although decided on the basis of the federal Rehabilitation Act and not Due Process under the Fifth Amendment, *Franco-Gonzales* is nevertheless a significant step towards the realization of the right to court-appointed counsel in removal proceedings, especially considering the court's comment on the question of funding such a program.

4. California State Law

Unfortunately, given the federal nature of the subject matter, states can do little to alleviate the problem of competent counsel in immigration matters. As noted before, removal proceedings and dependency proceedings share a lot in common with each other, and with criminal proceedings. However, in California for

⁵⁷ See 29 U.S.C. § 794(A) (2012) subsection (a) ("No otherwise qualified individual with a disability in the United States, as defined in section 705(20) of this title, shall, solely by reason of her or his disability, be excluded from the participation in, be denied the benefits of, or be subjected to discrimination under any program or activity receiving Federal financial assistance or under any program or activity conducted by any Executive agency. . .").")

⁵⁸ *Franco-Gonzales v. Holder*, 2013 U.S. Dist. LEXIS 186258 at *23 (2013). *Supra* note 2, at 23.

example, while the latter two are covered by statutes and favorable case law interpreting those statutes, the first area is mostly unreachable by state legislation. Authors have described this partial disconnect between state and federal agencies a “Kafkaesque” situation.⁵⁹

II. REMOVAL PROCEEDINGS RESULTING IN TERMINATION OF PARENTAL RIGHTS – A VOID

The problem of the lack of right to counsel is especially acute in an area of overlap between removal and dependency proceedings: that is, when a removal of a non-citizen will effectively result in termination of parental rights. This puts immigrant parents at an increased risk of losing their parental rights because of lack of access to counsel. Indeed, such a situation is even sadder for the parents because unlike in dependency cases, there is no claim that they have been unfit caregivers. I examine that area in the last sections of this paper.

Very often removal proceedings are coupled with proceedings resulting in termination of parental rights. As mentioned, the majority of states, including California, have determined that due process mandates the appointment of counsel before parental rights may be terminated.⁶⁰ However, because of the curious nature of bifurcation of authority between Congress in immigra-

⁵⁹ Nina Rabin, *Disappearing Parents: Immigration Enforcement and the Child Welfare System*, 44 CONN. L. REV. 99, 101-03 (2011). See also Vinita Andrapalliyal, *The CPS Took My Baby Away: Threats to Immigrant Parental Rights and a Proposed Federal Solution*, 7 HARV. L. & POL’Y REV. 173, *175, f.n. 26 (2013) (noting that “Family law is primarily under the purview of state law, while the federal government oversees most of our immigration law.”)

⁶⁰ See S. Adam Ferguson, *Not Without My Daughter: Deportation and The Termination of Parental Rights*, 22 GEO. IMMIGR. L. J. 85, 98 (2007) (“Because parental rights are often terminated once a parent is deported, a removal hearing may be the only hearing that the parent receives before her rights are terminated. To refuse counsel to immigrants when such a fundamental right is on the line seems to violate due process.”)

tion cases and the states in child custody cases, this statutory right to counsel does not help non-U.S. citizens facing removal.

The Ninth Circuit addressed a situation where an alien's removal would leave behind his two minor U.S. citizen children, in *Cabrera-Alvarez v. Gonzales*.⁶¹ In *Cabrera-Alvarez*, the petitioner-alien sought to cancel his removal to prevent hardship to his children. He contended that the United Nations Convention on the Rights of the Child supported his request to cancel removal.⁶² The court denied the alien's petition, noting that the Convention had not been ratified by the United States, but even if it had been, the alien's situation did not meet the "exceptional and extremely unusual" standard demanded by the text of 8 U.S.C.S. § 1229(b).⁶³

Judge Pregerson's dissent in this case contains noteworthy language pointing out the practical difficulties of meeting such a high standard:

Under the removal statute, the Board of Immigration Appeals (BIA) may grant an application for cancellation of removal only where removal would cause "exceptional and extremely unusual hardship" to the petitioner's citizen or lawful permanent resident family members — here, Cabrera-Alvarez's two young United States citizen children, ages eight and ten. 8 U.S.C. § 1229b(b)(1)(D). That onerous standard is so difficult to satisfy that there is only one published BIA decision that grants cancellation of removal after finding that the requisite "exceptional and extremely unusual hardship" existed.⁶⁴

⁶¹ *Cabrera-Alvarez v. Gonzales*, 423 F.3d 1006 (9th Cir. 2005).

⁶² See U.N. CONVENTION ON THE RIGHTS OF THE CHILD, NOV. 20, 1989, ART. 3(1), 28 I.L.M. 1448, 1459 (1989).

⁶³ See 8 U.S.C. § 1229B (b) (1) (D).

⁶⁴ *Cabrera-Alvarez v. Gonzales*, 423 F.3d at 1014.

III. WHERE DO WE GO FROM HERE?

In practice, although there is no right to counsel in immigration proceedings, including those that result in termination of parental rights, there are other avenues for indigent litigants to obtain representation. For example, there is court-ordered assistance in specific cases and there are volunteer organizations helping detainees.

However, there are various approaches that could help create a right to counsel in immigration proceedings, or alternatively, provide free access to competent counsel.

A. Trial Courts

Courts should be more cognizant of the situation and use their discretion to appoint counsel when removal may possibly result in termination of parental rights. This is the easiest approach in theory because it requires no change to existing law. However, this is also the most difficult approach in practice, because without a law ensuring right to counsel, uniformity among the district courts can never be achieved.

B. Federal Legislative Action Statutes (Existing and Proposed Statutes)

One approach to providing a federal statutory right to counsel in removal proceedings, mirroring the state statutes providing counsel in dependency proceedings, would be to amend Section 1362 of 8 U.S.C.⁶⁵ As mentioned earlier, in its current form Section 1362 provides: “In any removal proceedings before an immigration judge and in any appeal proceedings before the Attorney General from any such removal proceedings, the person concerned shall have the privilege of being represented (at

⁶⁵ 8 U.S.C. § 1362 (2012). *Supra* note 48.

no expense to the Government)”⁶⁶ The phrase “at no expense to the Government” can be removed through an amendment, thereby providing for assistance at the government’s expense. Alternatively, following reasoning similar to that in *Franco-Gonzales*, at least a Qualified Representative should be made available to non-citizens facing removal. This can come at very little or no cost to the government.⁶⁷

Another statutory approach would be to create new statutes in the area of removal proceedings that also involve family law. One such recommendation worth noting was made by Andrapalliyal.⁶⁸

C. Finding a Constitutional Right to Counsel Under the Due Process Clause – Case Law

As discussed, the development of case law in the area of immigration right to counsel has been promising. Future case law could extend *Lassiter* and *Padilla* to re-interpret Due Process rights under the Fifth Amendment to include those proceedings in which a non-citizen faces removal, at least specifically where a termination of parental rights could result.

In other words, if the U.S. Supreme Court re-interprets the Due Process Clause under the Fifth Amendment as requiring

⁶⁶ *Id.*

⁶⁷ See *Franco-Gonzales* 2013 U.S. Dist. LEXIS 186258 *supra* note 2, at *14. A “Qualified Representative” requirement by statute would parallel that of the Rehabilitation Act.

⁶⁸ Andrapalliyal, *supra* note 4857, at 187 (proposing the Immigrant Child Welfare and Parental Rights Act [ICWPRA], noting “the ICWPRA should also provide for assistance of counsel for immigrant parents faced with TPR proceedings against them, if not in all involuntary custody proceedings. Equipping indigent immigrant parents with assistance of counsel at the federal level may cut down on unjustified parental rights terminations by ensuring that all immigrant parents have a knowledgeable advocate to inform them about the law and make their case [P]erhaps the U.S. Department of Health and Human Services (DHHS) can pay the costs and fees associated with the appointments.”)

effective representation by counsel in removal proceedings, especially those resulting in termination of parental rights, then this unfortunate situation would be fully resolved. However, such an interpretation is radical and unlikely in the immediate future.

IV. CONCLUSION

There has been a lot of scholarship on *Civil Gideon*, or the right to counsel in certain civil cases. So far, case law from the United States Supreme Court has been discouraging in that there has been no indication of interpreting the Fifth Amendment Due Process rights to find a civil right to counsel.

However, certain areas in family law, specifically those where parents could potentially lose the right to their children, have been addressed by state legislatures that step in, affording statutory right to counsel to parents. These statutes have generally been favorably interpreted by the courts.

On the other hand, rather ironically, immigrants presently do not have right to counsel in proceedings where the exact same consequences may result, because of unfortunate federalism issues. This presents an illogically unfair situation for immigrant parents, because unlike in dependency cases, there is no claim that they are unfit parents.

There is an immediate and critical need to fill this void, either statutorily, or through re-interpretation of the Constitution through case law.